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IN THE

Supreme Court of the United States

October Term, 1955

No. 812

JOHN SINCERBEAUX,

Petitioner,

—v.—

FRANK T. HANLON,
Commissioner of Public Safety of the
City of White Plains, New York

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI AND BRIEF

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JOHN SINCERBEAUX,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

John Sincerbeaux prays that a writ of certiorari issue to review the order of the Court of Appeals, State of New York, denying a motion for reargument of leave to appeal to that Court from orders of the Supreme Court, State of New York, Appellate Division, Second Judicial Department, confirming the determination of an administrator dismissing him from civil service employment under the laws of the State of New York and denying reargument.

A petition under Article 78 of the New York Civil Practice Act (combining common law writs of certiorari, mandamus and prohibition) was brought in the Supreme Court, Westchester County, to review a determination by the respondent commissioner of public safety of the city of White Plains dismissing petitioner from the police department of that city. That court in an opinion by Doscher, *J.* (R.* 318-319), ff. 952-955) transferred the proceeding to the Supreme Court, Appellate Division, Second Judicial Department, pursuant to Section 1296 of the Civil Practice Act. The Appellate Division, the original court of determination in this matter, confirmed the administrative determination (R. 323, ff. 967-969) and denied leave to appeal to the Court of Appeals (R. 324-325, ff. 970-975) as did the Court of Appeals (R. 328, ff. 982-986). A motion for reargument was made in the Appellate Division with affidavits calling that court's attention to additional grave federal constitutional questions (R. 330-347, ff. 988-1041), and denied (R. 348, ff. 1042-1043). In accordance with Rule 20, Rules of the Court of Appeals, a motion for reargument of denial to leave to appeal was made to that court presenting all of the federal constitutional questions passed upon by the Appellate Division, and denied with costs to respondent by order entered on January 17, 1956. A motion to amend the order to indicate that a federal question was presented was also denied.

Opinions Below

A single opinion has been rendered in this case, that of Doscher, *J.*, transferring determination of this proceeding

* References to page numbers of the printed record are indicated by "R", and to folio numbers by "f." or "ff.".

from the Supreme Court, Westchester County to the Supreme Court, Appellate Division, Second Judicial Department, pursuant to Section 1296 of the New York Civil Practice Act. That opinion is unreported and is printed in the record (R. 318-319, ff. 952-955). The decision of the Appellate Division confirming the administrative determination is reported in 282 App. Div. 960, 126 N. Y. S. 2d 202. Denial of leave to appeal to the Court of Appeals is reported for the Appellate Division in 283 App. Div. 670, 127 N. Y. S. 2d 845, and for the Court of Appeals in 306 N. Y. 986, 119 N. E. 2d 610. Denial of motion for reargument is reported for the Appellate Division in 284 App. Div. 893, 134 N. Y. S. 2d 598, and for the Court of Appeals in 309 N. Y. —, 131 N. E. 2d 739.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3). See also Rules 19, 21, 22 and 23, Revised Rules of the Supreme Court of the United States. The order of the Court of Appeals, State of New York, was entered on January 17, 1956. Grounds for invokement of jurisdiction are that the questions presented by petitioner constitute grave ones of constitutional law under the due process clause of the Fourteenth Amendment of the Constitution of the United States. In a procedural sense, due process has been flagrantly disregarded by a proceeding in which petitioner's entire stake in public employment, its pension and retirement rights and privileges, has been destroyed by a trier of fact who does not deny that he thrice indicated the outcome before the opening of the trial prescribed by law, and then conducted the proceeding

to assure the result announced in advance. In a substantive sense, due process was denied by the arbitrary, capricious and unreasonable deprivation of petitioner of his public employment and pension rights on the patently absurd charge that he performed a duty enjoined upon him by the law of the State contrary to an unlawful order not to do so. Each point involves, in one or more of its aspects, a matter of first impression in this Court. Denial of due process in a substantive sense was implicitly raised by argument in the Supreme Court both in Westchester County and upon transfer in the Appellate Division. Denial of both procedural and substantive due process was explicitly raised upon reargument both in the Appellate Division and Court of Appeals by affidavits and briefs. See *Atchison, Topeka & Sante Fe Railway* v. *Public Utilities Commission*, 346 U. S. 346, 349; *Williams* v. *Georgia*, 75 S. Ct. 814.

Questions Presented

On this petition, the following questions are presented arising under the Constitution of the United States (Article IV, Section 1):

1. Does a hearing that amounts to a form preceding a predetermined result by a trier of fact personally prejudiced against the accused and improperly interested in the outcome accord procedural due process?

2. Does a hearing characterized by wholesale exclusion of evidence offered by accused, frustration of cross-examination by accused, refusal to permit material witnesses to testify, and admission of dis-

connected, prejudicial and immaterial evidence of prior disciplinary charges against accused, accord procedural due process?

3. Is deprivation of accused of his right to employment and pension under the laws of the State on charges that he enforced the law of the State contrary to administrative order not to do so, so arbitrary, capricious, unreasonable and clearly unlawful as to amount to denial of substantive due process?

Reasons Relied On for the Allowance of the Writ

Few questions command public importance equal to those presented by arbitrary dismissal of public employees. In the only case since 1937 in which this Court held invalid a portion of an Act of Congress, one involving deprivation of remuneration for federal civil servants, this Court observed: "The effect was to inflict punishment without the safeguard of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a state or by the United States." *United States* v. *Lovett*, 328 U. S. 303, 316-317.

What cannot be done by the United States by legislative action certainly cannot be done by state administrative action "without the safeguard of a judicial trial" and with a proceeding that preceded a predetermined result in which the respondent does not deny that on three occasions prior to any hearing he announced the outcome. Such avowed bias by a trier of fact (Point I, *post*) clearly evidenced by the conduct of the hearing (Point II, *post*) deny property without due process of law in a procedural sense,

contrary to the Fourteenth Amendment. The arbitrary, capricious and unreasonable nature of the charge against petitioner, *viz.*, that he refused to violate a state statute in obedience to an administrative order to do so, denied petitioner numerous rights attendant upon employment in the state civil service contrary to the due process clause of the Fourteenth Amendment, considered in a substantive sense (Point III, *post*).

Constitutional and Statutory Provisions Involved

Constitution of the United States of America, Amendment XIV, §1:

> "* * *, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

New York Penal Law §1841. Provision as to neglect of duty.

> "A public officer, or person holding a public trust or employment, upon whom any duty is enjoined by law, who wilfully neglects to perform the duty, is guilty of a misdemeanor. This and section eighteen hundred and forty do not apply to cases of official acts or omissions to prevention or punishment of which is otherwise specially provided by statute."

New York Penal Law §1824. Attempting to prevent officer from performing duty.

> "A person who attempts, by means of any threat or violence, to deter or prevent an executive officer from

performing any duty imposed upon such officer by law, is guilty of a misdemeanor."

New York Penal Law §580. Definition and punishment of conspiracy.

"If two or more persons conspire:

1. To commit a crime; or,

• • •

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor."

Statement of the Case

Late on June 18, 1952, petitioner was charged with violation of two regulations of the police department of the city of White Plains allegedly committed several days earlier (R. 263, f. 787). The charges arose from petitioner's enforcement of the law, while a patrolman in the police department of the city of White Plains, in violation of an alleged order not to enforce the law. Several days before any trial and before any charges were either preferred or served upon petitioner, his resignation was demanded by the chief of police pursuant to orders of the respondent trier of fact (R. 263, f. 787). Before commencement of the hearing, respondent trier of fact told petitioner's attorney (R. 342, f. 1026).

"I will not only dismiss him from the police force but put the taxi out of business."

Before the taking of any testimony, another threat to dismiss petitioner from the police department and put

Airway, petitioner's wife's taxicab company, licensed by respondent, out of business, was made by respondent and referred to again in the course of the hearing (R. 339, f. 1015; R. 343, f. 1027; R. 199, f. 597):

> **"I will dismiss you from the police force and put the Airway out of business."**

None of these statements are denied by respondent (R. 345-347, ff. 1033-1041). Accordingly, before commencement of trial, counsel for petitioner requested respondent to disqualify himself as trier of fact in place of an available, disinterested deputy commissioner, and the request was denied with appropriate exception taken (R. 28, f. 83). Repetition of the request was followed by repeated denials by respondent (R. 31, f. 92; R. 43, ff. 129, 130).

To establish certain matters material to his defense, petitioner subpoenaed respondent and one of his deputy commissioners. Respondent, though called as a witness by petitioner, refused to testify (R. 208-209, ff. 623-626). In addition, respondent refused to permit his deputy commissioner to testify although similarly subpoenaed and called by petitioner (R. 211-213, ff. 631-640).

Respondent in the conduct of the proceeding made wholesale exclusion of virtually the entire case of petitioner, refusing to permit even offers of proof by petitioner and the marking for identification of documents offered by petitioner. Petitioner, himself a witness, was prevented from giving material testimony bearing on his defense by systematic exclusionary rulings of respondent no fewer than **80** times (R. 229-290, ff. 685-870; R. 305-312, ff. 913-935). Objections to questions put by petitioner's attorney to witnesses called in his behalf were sustained by re-

spondent 45 out of 46 times (R. 198-210, ff. 593-627; R. 210-214, ff. 630-640; R. 189-195, f. 582). This was so although petitioner's attorney made no objections to the direct presentation of respondent's case. Cross-examination of respondent's witnesses by petitioner's attorney was frustrated by exclusionary rulings no fewer than 49 times (R. 47-74, ff. 139-222; R. 77-91, ff. 230-273; R. 97-130, ff. 290-389; R. 153-178, ff. 458-533). All told, no fewer than 174 such exclusionary rulings were made by respondent against petitioner (Point II, *post*). On the other hand, two instances of disciplinary charges to which petitioner had pleaded guilty, one over 14 years before, and the other 7 years before the filing of the instant charges for which petitioner was being tried, were introduced in evidence over objection and exception of petitioner's counsel (R. 303-305, ff. 908-915).

Promptly, at the conclusion of testimony, respondent found petitioner guilty as charged and dismissed him from the police department of the city of White Plains (R. 316-317, ff. 948-950).

ARGUMENT

POINT I

A hearing that is a mere form preceding a predetermined result by a trier of fact personally prejudiced against accused and improperly interested in the outcome denies due process of law.

Before both the preferring and service of charges, respondent flatly demanded petitioner's resignation within an hour (R. 263, f. 787; R. 338, f. 1014; R. 342, f. 1026).

Before the commencement of any hearing, respondent told petitioner's attorney over the telephone, and the attorney recorded the fact in his diary (R. 342, f. 1026):

> **"I will not only dismiss him from the police force but put the taxi out of business."**

Before the taking of any testimony at the hearing, respondent trier announced to petitioner in his attorney's presence (R. 339, f. 1015; R. 343, f. 1027):

> **"I will dismiss you from the police force and put the Airway out of business."**

Respondent reiterated the threat, insofar as it menaced Airway, the taxicab company of petitioner's wife, during the conduct of the hearing (R. 199, f. 597):

> "I may indicate to you, Counselor, that you may have a very clear possibility of trying that issue out [the licensed operation of Airway] very shortly."

Accordingly, when petitioner repeatedly urged respondent to disqualify himself as trier of fact in favor of an available disinterested deputy, he repeatedly refused, and appropriate exception was taken (R. 28, f. 83; R. 31, f. 92; R. 43, ff. 129, 130).

Deprivation of rights to public employment and its consequent pension and retirement benefits under a trial required by law that is a mere form preceding a predetermined result denies due process of law in a procedural sense under the Fourteenth Amendment of the Constitution of the United States.

> *In re Murchison*, 349 U. S. 133;
> *Tumey* v. *Ohio*, 273 U. S. 510;

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38 at page 73;
National Labor Relations Board v. *Phelps et al.,* 5 Cir., 136 F. 2d 562;
People ex rel. Packwood v. *Riley,* 232 N. Y. 283;
Reger v. *Mulrooney,* 241 App. Div. 38 (1st Dep't), aff'd 266 N. Y. 512;
People ex rel. Tappin v. *Cropsey,* 178 App. Div. 180 (2d Dep't), aff'd mem., 224 N. Y. 564;
Eigo v. *Wheeler,* 248 App. Div. 73 (3d Dep't);
People ex rel. McMorrow v. *Roosevelt,* 23 App. Div. 533 (1st Dep't);
Oakley v. *Aspinwall,* 3 N. Y. 547;
Payne v. *Lee,* 222 Minn. 269, 24 N. W. 2d 259;
1 Vom Bauer, *Federal Administrative Law,* §309.

POINT II

The wholesale exclusion of evidence of accused, frustration of cross-examination by him, refusal to permit material witnesses to testify, and admission of disconnected, prejudicial and material evidence of prior disciplinary charges denied any fair hearing required by procedural due process of law.

All told, respondent frustrated petitioner in adducing evidence from his own and respondent's witnesses no fewer than **174** times (R. 198-210, ff. 593-627; R. 210-214, ff. 630-640; R. 194, f. 582; R. 229-290, ff. 685-870; R. 305-312, ff. 913-935; R. 47-74, ff. 139-222; R. 77-91, ff. 230-273; R. 97-130, ff. 290-389; R. 153-178, ff. 458-533; R. 291-305, ff. 871-914).

Indeed as respondent pointedly retorted to petitioner's attorney when the latter protested that he ought not to be

stopped from making even an offer of proof (R. 202, f. 606):

"I am going to try to, I am going as far as I can."

Coupled with the wholesale exclusion was refusal to permit marking for identification of documents offered in evidence by petitioner (R. 269-270, ff. 807-810), and refusal by respondent to honor a subpoena and call by petitioner for his testimony (R. 208-209, ff. 623-626). It would be unnecessarily prolix and beyond permissible scope of this brief to point out the errors of exclusion in each of these instances. The offers of proof were material, relevant and necessary to establish the points made in this petition. The exclusion of such evidence on a systematic basis and the wholesale denial of the right of petitioner to cross-examine adverse witnesses to any extent whatsoever, deprived him not only of a fair hearing, but virtually of any hearing at all.

Reilly v. *Pinkus*, 338 U. S. 269;
Powhatan Mining Co. v. *Ickes*, 6 Cir., 118 F. 2d 105;
People ex rel. Kasschau v. *Board of Police Commrs.*, 155 N. Y. 40;
In re Greenbaum, 201 N. Y. 343;
Reger v. *Mulrooney*, 241 App. Div. 38 (1st Dep't), affirmed, 266 N. Y. 512;
Friedel v. *Board of Regents*, 296 N. Y. 347 at page 352.

POINT III

Deprivation of employment and pension rights on charges that a peace officer enforced a state statute contrary to an alleged order not to do so is so arbitrary, capricious, unreasonable and unlawful as to amount to denial of substantive due process.

Petitioner's first two points attack the fairness of the hearing accorded him as a denial of procedural due process in Constitution of the United States. Assuming *arguendo* that an order was given petitioner not to enforce the law, so as to eliminate in this petition any question of conflicting evidence, such order was clearly unlawful. To make such an order to a peace officer, would subject its author to criminal prosecution. *Penal Law* §1824, *ante*, p. 6; see *People* v. *Porter*, 115 Misc. 301, 189 N. Y. Supp. 664 (Gen. Sess.). For a policeman to obey such an order would involve the commission of a crime and forfeiture of his employment. *Penal Law* §1841, *ante*, p. 6; *People* v. *Herlihy*, 66 App. Div. 538, affirmed, 170 N. Y. 584; *Delaney* v. *Flood*, 45 Misc. 97, 91 N. Y. Supp. 672 (Sup.).

The agreement of the superior and subordinate not to enforce the law in a situation like the instant one would amount to a criminal conspiracy. Penal Law §580(1), (6), *ante*, p. 7. Conceding *arguendo* all disputed issues of fact in this case, the charge on its face is absurdly unlawful in a criminal sense. Removal of a police officer for execution of his sworn duty to enforce the laws of the State on the ground that in doing so he violated a contrary administrative order is so arbitrary, capricious, unreasonable and clearly unlawful as to deprive such officer

of a vested right without due process of law in a substantive sense.

Wieman v. *Updegraff*, 344 U. S. 183;
Peters v. *Hobby*, 349 U. S. 331;
Cf. Bailey v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed by equally divided court, 341 U. S. 918.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES D. LEWIS
Attorney for Petitioner

FREDERICK J. LUDWIG
of Counsel

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against

FRANK T. HANLON, Commissioner of Public Safety of The City of White Plains, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Frank T. Hanlon, Commissioner of Public Safety of The City of White Plains, New York,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of Case

Under date of June 18, 1952 written charges were preferred against the petitioner by Chief William A. Sullivan of the Police Department of The City of White Plains for violation of Rules 105 and 153 of the Police Department Rules and Regulations. Thereafter and on or about July 31, 1952 petitioner pleaded "not guilty". A trial was held and testimony taken, said trial being concluded on August 6, 1952.

After considering all of the evidence, the commissioner of public safety, the respondent herein, found the petitioner "guilty" on each of two charges and dismissed him from the police force of The City of White Plains.

The charges were the result of the petitioner having an argument with a brother officer over the issuance of two summonses and the disobedience of an order given said petitioner by a superior officer.

A petition under Article 78 of the New York Civil Practice Act (combining court law writs of certiorari, mandamus and prohibition) was brought in the Supreme Court, Westchester County, to review a determination by the respondent, commissioner of public safety of The City of White Plains, dismissing petitioner from the police department of that city.

The court, in an opinion by Doscher, J. (R. *318-319, ff. 952-955) transferred the proceeding to the Supreme Court, Appellate Division, Second Judicial Department, pursuant to section 1296 of the said Civil Practice Act.

The Appellate Division confirmed the determination of the respondent (R. 323, ff. 967-969) and denied leave to appeal to the Court of Appeals (R. 324-325, ff. 970-975), as did the Court of Appeals (R. 328, ff. 982-986).

A motion for reargument was made in the Appellate Division (R. 330-347, ff. 988-1041) and denied (R. 348, ff. 1042-1043).

Thereafter, a motion for reargument of denial for leave to appeal was made in the Court of Appeals and denied, with costs to respondent, by order entered on January 17, 1956. A motion to amend that order to indicate that a federal question was involved was also denied.

Opinions Below

A single opinion has been rendered in this case, that of Doscher, J., transferring determination of this proceeding from the Supreme Court, Westchester County, to the Su-

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ARGUMENT

POINT I

Questions raised are not constitutional and are not concise or of public importance.

The questions which are sought to be reviewed are questions of an evidentiary nature. They are not concise questions of law; they are not based upon the principle that it will settle the law of the state of New York *or review a constitutional question*, nor are the questions of a novel nature nor of great public importance, but rather are of a general principle of law as to the rights of the parties under a peculiar state of facts which is not likely to be repeated.

POINT II

Petitioner had a fair trial and was not denied due process of law.

The petitioner, from the time written charges were served upon him and throughout the entire trial, was represented by counsel.

The statements set forth in petitioner's brief under "Statement of the Case" and under "POINT I" of his argument, namely: "I will not only dismiss him from the police force but put the taxi out of business", are not part of the record of the trial. No evidence was submitted at the trial that such statements were made. They are merely incorporated in affidavits of Charles D. Lewis, attorney for petitioner, and which statements are herein denied as having been made and were denied before the Supreme Court, Appellate Division, and the Court of Appeals of the State of New York.

POINT III

The commissioner of public safety is the trial judge pursuant to charter provision.

The respondent, as commissioner of public safety of The City of White Plains, acted in accordance with section 234 of the charter of The City of White Plains and did comply fully with the said provision. Section 234 of the charter of The City of White Plains provides as follows:

> "§ 234. RULES AND REGULATIONS. The commissioner of public safety shall make, adopt and enforce such reasonable rules, orders and regulations, not inconsistent with law, as may be necessary to effect a prompt and efficient exercise of all the powers conferred and the performance of all the duties imposed by law upon him or the department under his jurisdiction. He is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the government, discipline, administration and disposition of the officers and members of the police department, and for the hearing, examination, investigation, trial and determination of charges made or prepared against any officer or member of said department for neglect of official duty or incom-

petency or incapacity to perform his official duties, or some delinquency seriously affecting his general character or fitness for the office, and may, in his discretion, punish any officer or member found guilty thereof by reprimand, imposition of fines or by the forfeiture and withholding pay for a specified time, suspension during a fixed period or dismissal from office; but no officer or member of said department shall be removed or otherwise punished for any other cause, nor until specified charges in writing have been preferred against and served upon him and he shall have been found guilty thereof, after reasonable notice and upon due trial by the aforesaid commissioner of public safety in the form and manner prescribed by the rules and regulations of the department."

The law is well settled that the charter provision must be followed.

Matter of Joseph J. Ryan v. *Hand*, 258 App. Div. 912.

POINT IV

The commissioner of public safety was not disqualified to sit as trial judge.

It is the contention of the petitioner that the respondent was disqualified to sit as trial judge merely on the ground that he was served with a subpoena. Petitioner at no time before the commencement of the trial set forth any reason or reasons for the disqualification of the respondent. It was not alleged that the respondent had any knowledge of the charges prior to their being prepared or that he had expressed any sentiment as to the charges. The mere service of a subpoena upon the respondent without explanation is not sufficient to disqualify him.

It is not error for a commissioner to sit on a trial of charges against a policeman after he has been challenged on the ground that he has prejudged the case and does not intend to give the policeman a fair trial; it not being claimed that such commissioner had any interest in the matter or was disqualified by any statute.

People ex rel. Doherty v. *Board of Police Commissioners,* 84 Hun 64, 32 N. Y. Supp. 18. Judgment affirmed *Same* v. *Martin,* 148 N. Y. 757

Under the New York City charter, the police commissioner is the only official who can dismiss a police officer and he is not disqualified from trying an officer and dismissing him from the force because prior to the trial he had received a report of his misconduct and declared knowledge of his guilt.

People ex rel. Campbell v. *Partridge,* 99 App. Div. 410, affirmed 180 N. Y. 542.

Charter provisions authorizing an alderman to act for a mayor, where latter is "unable to perform his duties", do not empower such alderman to discipline a policeman because the mayor expected to be a witness in the policeman's behalf, since the mayor was at most *only disqualified from testifying.*

People ex rel. Liberty v. *Cooke,* 188 App. Div. 351. Judgment affirmed 229 N. Y. 613.

The court in the above case had this to say:

"But the law is well established that a juror may be a witness upon a trial before himself and his fellows, first being sworn as a witness besides his oath as juror. But where a judge who is called to the

witness box is actually trying the cause and his continuance in acting as judge is necessary to the seemly and proper trial of the cause, then he may not become a witness; it is error so to do, and if objection be made, and exception taken, it is fatal error. (*People* v. *Dohring*, 59 N. Y. 374, 378.)"

POINT V

The failure to admit into evidence certain records, not reversible error.

The petitioner, throughout the trial, made several attempts to inject into the record the certificate of the incorporation of the Air-Way Yellow Cab Co., Inc. and several other papers in relation to the activities of the said taxicab company.

The record will disclose that the petitioner is not an officer or stockholder of the said taxicab company; that the said papers offered in evidence were plainly extraneous matters not related to the issues involved in the proceeding and could have no bearing on the issues as set forth in the charges preferred.

The offer of the said aforementioned papers was an improper attempt to inject into the record that the commissioner of public safety, the respondent herein, had knowledge of the incorporation of the taxicab company and had given his consent to its operation.

It is denied that permission was ever given to anyone to form the taxicab company, with the exception of the authorization and consent obtained from the State of New York and that no other consent was necessary for the operation of the taxicab company in The City of White Plains.

The petitioner's activities, if there were any in connection with the taxicab company, are not pertinent to the

issues, nor, for that matter, is any conference or conferences had by an officer of the taxicab company with any official of The City of White Plains pertinent or relevant to the issues, nor is the petitioner's removal from a particular duty in the police department material to the issues.

The real issue was the argument had with a brother officer and disobedience of orders issued by a superior officer.

The respondent committed no error when he ruled that he would not admit into evidence the documents offered, nor permit their being marked for identification, nor permit an offer of proof as to the said documents.

The courts have held repeatedly that there is no error in refusing to mark for identification a paper which the court has properly declined to admit into evidence.

Guilfoyle v. *Pierce*, 4 App. Div. 612.

POINT VI

Receipt of petitioner's record into evidence by the respondent, no error.

The trial commissioner has a right to consider petitioner's record in the department, if not used in determining his guilt or innocence. Nowhere in the record does it appear that the record was considered and used improperly.

Where the commissioner's return in a proceeding to dismiss a fireman shows only that his record was before the commissioner and it does not affirmatively appear that it was used improperly to determine the fireman's guilt, the court reviewing the proceeding on certiorari will assume that it was used for a proper purpose.

People ex rel. McCallum v. *Scannell*, 56 App. Div. 51.

In the case of *People ex rel. Kiebrick* v. *Roosevelt*, 1 App. Div. 577, affirmed 151 N. Y. 675, which was an action to remove a police officer, the court stated:

> "The record was not introduced upon the trial, and the accused had no opportunity of explaining it. It was considered in his absence and without his knowledge and, certainly, it was highly prejudicial."

It would appear from a reading of that case, that the court acknowledges that the record is admissible into evidence with the accused having a right to explain the record.

The *Roosevelt* case was cited with approval in the *Scannell* case referred to above, and in which case the court also made reference to *People* v. *York*, 52 App. Div. 295, cited by the petitioner in his brief. It would appear in that case that the record, though admitted into evidence, was improperly used and that there was comment with reference to the record in the pronouncing of the guilt of the policeman. Such was not the fact in the instant case, although the record was admitted into evidence, no mention of the record was made by the relator when he rendered his decision.

POINT VII

The courts will not set aside the determination of a trial commissioner if there is competent evidence in the record to support his findings.

The reason which supports the above rule of law is that good police service and discipline require that a broad discretion remain with the police commissioner because he is ultimately responsible for the proper and efficient performance of the police force.

In the case of *People ex rel. Hogan* v. *French*, 119 N. Y. 493, the court said:

"The General Term, with undisguised reluctance, affirmed the order upon the authority of our decision in *People ex rel.* v. *French* (110 N. Y. 494). I think that they misunderstood its scope and meaning, and viewed it as establishing a rigid and arbitrary rule which left the action of the police commissioners practically without restraint. To that decision we shall steadily adhere. Its conclusion we do not desire to change, and its doctrine, which we then approved, seems to us still entirely correct and sound. That doctrine was that where there was any evidence of the offense charged, or the facts admitted of any inference of guilt, we should follow the conclusion of the commissioners in view of their peculiar responsibilities and their larger opportunities of arriving accurately at the truth."

Also, in *People ex rel. Brown* v. *Greene,* 106 App. Div. 230, affirmed 184 N. Y. 565 (without opinion), the Court held:

"The holding of the Appellate Courts of this State has uniformly been that the good of the service requires that a wide discretion should be vested in police commissioners, and that their judgment and determination in a given case will not be disturbed unless there is an absence of evidence to sustain it. They being the statutory judges of offenses against the discipline and efficiency of the police force under their jurisdiction, their findings and determinations on the facts, when the evidence is conflicting and contradictory, should be regarded as conclusive, when there is, as in this case, sufficient evidence, if believed, to sustain their determinations.

The determination of the defendant should be confirmed, with costs."

And, in *People ex rel. Masterson* v. *French, et al.,* 110 N. Y. 494, the Court of Appeals explains the great weight

which is given to the trial commissioner's findings, as follows:

> "Whether under special circumstances, a particular officer is excusable, for having voluntarily rendered himself unfit for duty, or violated police regulations, depends so much upon the personal knowledge and experience of the commissioners, and the consideration by them of individual character, the general moral condition and discipline of the force, and other facts peculiarly within their knowledge, that an attempted review of their action by an appellate tribunal would proceed in a great measure, in ignorance of the facts upon which it was predicated.
>
> The government of a police force assimilates to that required in the control of a military body, and the interference of an extraneous power in its practical control and direction, must always be mischievous and destructive of the discipline and habits of obedience, which should govern its subordinate members. If its determinations upon all questions are subject to review, and appeals to some tribunal outside the force may be taken without restraint, it must necessarily lead to a want of respect towards their official superiors, and an impairment of the habits of obedience and discipline which are so essential to the efficiency and good conduct of a well regulated police force.
>
> We are, therefore, of the opinion that this question was exclusively for the consideration of the commissioners, and that the Appellate Court had no authority to review the exercise of their discretion on the subject. (*People ex rel. Hart* v. *Bd. of Fire Comrs., supra.*)"

See also:

> *Hannon* v. *Wagner*, 273 App. Div. 819, appeal denied 273 App. Div. 868, appeal dismissed 296 N. Y. 958.

Upon the law and the evidence the findings of the trial commissioner should not be disturbed and the courts do not substitute their judgment for that of the trial commissioner.

POINT VIII

A disciplinary trial is not a formal legal trial bound by its rules of evidence.

A trial before a commissioner, as in the instant case, is not a trial in a court of law. The respondent is not presumed to have full knowledge of the rules of evidence and for that reason, the hearings are informal and much latitude is given.

The court in the case of *Gribbon* v. *Freel*, 93 N. Y. 93, had this to say:

> "The board of police commissioners of New York City is an administrative tribunal vested with disciplinary powers and not a court limited in its functions, nor confined by the application of strict legal rules governing trials in courts of law."

POINT IX

The petitioner was subject to the Rules and Regulations of the Police Department of the City of White Plains.

It is contended that since the petitioner was not on a tour of duty, but was as he terms it, on "relief of duty", he was not subject to the rules and regulations of the police department.

A policeman, when sworn in, is a policeman twenty-four hours a day and as such is subject to all orders and regulations. This is set forth in Rule 74 of the Police Department Rules and Regulations, which is as follows:

"Rule 74. A member of the force shall be fit for and subject to duty at all times, except when on sick report. He shall devote his entire time and attention to the service of the police department, and shall not engage in any other business or calling, except that when a member of the department is suspended without pay, he may, with the permission of the Commissioner of Public Safety, engage temporarily in other business or calling."

In addition to the above, Rule 105 of the Police Department Rules and Regulations states as follows:

"Rule 105. A member of the department shall promptly obey all lawful orders of his superior officers."

This rule does not distinguish as between hours during a tour of duty or the so-called "relief of duty" hours. It unequivocally states that a policeman shall *obey all orders* of his superior officer.

To show the inconsistency of the petitioner's position, he asserts he, not being on a tour of duty, was in the same capacity as a private citizen and not subject to orders. Yet, he went out on the morning of June 15, 1952 and served three summonses, not as a private citizen, but as Patrolman John Sincerbeaux, policeman on the White Plains Police Force. Having taken that position, he is unquestionably subject to the rules and regulations of the department.

POINT X

Petitioner was not deprived of employment and pension rights as to amount to denial of substantive due process.

Petitioner was at the time of his employment a member of the local pension system (for certain firemen and policemen only). The statute (a local law and part of the city

charter) provides for the payment of deductions of two per centum from salaries for pension purposes. The local law provides that such member, or his heirs, in order to be entitled to a pension be: "* * * killed in the actual performance of police duty, die from injuries received in the actual discharge of his duty, becomes permanently disabled by reason of his performance of duty and be retired * * *".

Petitioner's service was terminated by dismissal and since the local law makes no provision for payment of pension except as above provided, or for the refund of payments made to said pension fund, the petitioner has no vested rights in said pension fund.

Donovan v. *The City of Rye*, 271 App. Div. 836;
Matter of Graven v. *Scott*, 249 App. Div. 514;
Pennie v. *Reiss*, 132 U. S. 464;
Richards v. *City of Geneva*, 161 Misc. 572.

POINT XI

Order given to petitioner by superior officer was not arbitrary, capricious, unreasonable or unlawful as to amount to denial of substantive due process.

Section 1841 of the Penal Law of the State of New York, as set forth on page six of petitioner's brief, applies only to such public officers who wilfully neglect to perform a duty of their office.

In the instant case, the petitioner was informed by a superior officer (R. 95, ff. 285-286) not to issue any summonses after telling his superior officers that he (petitioner) was going to give out summonses to other taxicab drivers. Petitioner did issue several summonses while off duty and in civilian clothes, illegally (R. 161, f. 43). This was a deliberate act on the part of the petitioner in not

obeying a lawful command of a superior officer, all resulting in a general disregard of good order and authority.

The act only applies to a police officer or other public officer who sees an unlawful act performed, who wilfully neglects to perform his duty.

People v. *Mummiani*, 258 N. Y. 394, 180 N. E. 94.

Further, nowhere in the record does it appear that any attempts were made by means of any threat or violence by a superior officer upon the petitioner not to issue the summonses, and petitioner's claim that the issuance of such order by a superior officer amounted to a conspiracy is ridiculous and absurd.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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